

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 7, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2213**

**STATE OF WISCONSIN**

**Cir. Ct. No. 2010FA11**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**JEFFREY P. ERBS,**

**PETITIONER-APPELLANT,**

**V.**

**MARY ANN ERBS,**

**RESPONDENT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Chippewa County:  
STEVEN R. CRAY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve  
Judge.

¶1 PER CURIAM. Jeffrey Erbs appeals his divorce judgment and an order denying post-divorce motions. He argues the circuit court erroneously exercised its discretion concerning property division and maintenance. We affirm.

¶2 Jeffrey and Mary Ann Erbs were married in 2003 and divorced seven years later. This was the second marriage for both parties. Mary Ann was fifty-eight years old at the time of the marriage and employed as a respiratory therapist. Jeffrey was forty-seven years old at the time of the marriage and employed as an electrical contractor. While the divorce was pending, Jeffrey was awarded social security disability benefits.

¶3 The circuit court held a final hearing on October 18, 2010, and an interlocutory judgment of divorce was filed on January 27, 2011. On January 27, the court heard evidence regarding property division and maintenance, among other things. The court subsequently issued a decision dividing the property equally. The court also denied Jeffrey's maintenance request.<sup>1</sup>

¶4 The division of property and the awarding of maintenance rest within the sound discretion of the circuit court. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). We generally look for reasons to sustain the circuit court's discretionary decisions, and we search the record for reasons to sustain the court's

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<sup>1</sup> Mary Ann waived any claim for maintenance.

findings of fact. *See Steiner v. Steiner*, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687 N.W.2d 740. Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).<sup>2</sup>

¶5 Jeffrey acknowledges the circuit court intended an equalized property division, but argues the court miscalculated the equalization payment.<sup>3</sup> However, Jeffrey filed numerous post-divorce pleadings challenging various aspects of the court’s decision, which the court construed as motions for reconsideration. In none of these pleadings did Jeffrey raise the calculation error issue. Had he done so, the court could have easily corrected this issue. By failing to raise this issue in the circuit court, Jeffrey has forfeited the issue on appeal.<sup>4</sup> *See Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

¶6 Jeffrey also argues the circuit court erroneously included \$2,200 in his checking account in the property division. He insists the money in that account was either non-divisible lump-sum social security disability benefits, or monthly social security disability income. However, the party asserting property is not subject to division has the burden of proving the property is non-divisible at the time of the divorce. *Derr v. Derr*, 2005 WI App 63, ¶11, 280 Wis. 2d 681, 696 N.W.2d 170. The circuit court is not an advocate. *Fowler v. Fowler*, 158 Wis. 2d 508, 519, 463 N.W.2d 370 (Ct. App. 1990).

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<sup>2</sup> References to the Wisconsin Statutes are to the 2011-12 version.

<sup>3</sup> In her response brief, Mary Ann concedes error in the calculation but contends any error was waived.

<sup>4</sup> Jeffrey asserts in his reply brief that the “waiver rule is a rule of judicial administration, which an appellate court may, in its discretion, choose not to apply.” Given the ample opportunity Jeffrey had to bring this matter to the circuit court’s attention, we reject Jeffrey’s attempts to avoid the waiver rule.

¶7 Here, Jeffrey did not provide the circuit court with evidence showing the funds in his checking account included non-divisible property. In fact, Jeffrey consistently maintained he was not required to provide any information concerning his disability benefits, was uncooperative with Mary Ann's efforts to obtain such information, and acquiesced only after the court held him in contempt. The court's decision to include these funds in the property division was an appropriate exercise of discretion.

¶8 Jeffrey also argues the circuit court improperly included funds he withdrew from retirement accounts in the property division. In support of his position, Jeffrey insists "[t]here was no evidence that [Jeffrey] did not spend the money for living expenses during the times involved." However, the court was not required to accept Jeffrey's general assertion regarding the disposition of these funds. As the court properly found, "[n]o explanation or accounting for these funds has been made. Further, no showing has been made that the withdrawn funds ... are non-divisible funds."

¶9 Moreover, the court also found: "[T]here is a showing that a sufficient income was available to the parties when they were living together in 2008 and 2009 to cover their claimed expenses from the income sources they were then receiving. The funds were not necessary for the purpose of day to day living."

¶10 An adequate basis exists in the record to support the circuit court's determination and its findings are not clearly erroneous. WIS. STAT. § 805.17(2). The court's decision to include the funds Jeffrey withdrew from his retirement account was a proper exercise of discretion.

¶11 Finally, Jeffrey argues the circuit court erroneously exercised its discretion by denying him maintenance.<sup>5</sup> He contends the court erred by including his social security disability lump-sum payment for back-benefits as income for purposes of determining his need for maintenance. He also asserts the court failed to include all of Mary Ann’s income when comparing current incomes.

¶12 In her response brief, Mary Ann contends that disability benefits, such as social security disability benefits, replace the wages lost by the individual due to the disability and are generally classified as income at divorce. In this regard, Mary Ann relies upon *Weberg v. Weberg*, 158 Wis. 2d 540, 543-44, 463 N.W.2d 382 (Ct. App. 1990) and *Leighton v. Leighton*, 81 Wis. 2d 620, 636, 261 N.W.2d 457 (1978). Jeffrey does not reply to this caselaw.<sup>6</sup> Arguments not refuted are deemed admitted. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶13 We also conclude Jeffrey has not sufficiently demonstrated how the circuit court purportedly failed to include all of Mary Ann’s income. In addition, Jeffrey fails to acknowledge that Mary Ann was sixty-five years old at the time of trial, and desired to reduce her work hours. The court appropriately found that “it

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<sup>5</sup> Jeffrey violates WIS. STAT. RULE 809.19(1)(i) by referring to the parties by designations such as “Petitioner-Appellant” and “Respondent,” rather than by name. Future violations of the rules of appellate practice may result in sanctions.

<sup>6</sup> In his principal brief to this court, Jeffrey cites *Weberg v. Weberg*, 158 Wis. 2d 540, 551, 463 N.W.2d 382 (Ct. App. 1990), and suggests social security disability payments, “as with a settlement amount in a personal injury case, is generally a non-divisible asset, it is viewed like gifted property in treatment for both property division and maintenance.” We conclude Jeffrey misrepresents *Weberg*. His contention that lump-sum social security disability benefits are akin to a personal injury recovery is unsupported and will not be further considered. See *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Jeffrey also suggests the court engaged in improper double-counting, but the argument is undeveloped. We will not abandon our neutrality to develop arguments. *Id.*

is highly likely that [Mary Ann] will either retire completely or significantly reduce her working hours in the next 36 months at which time she will be 69 years old.” The court also found that at the end of that time, Mary Ann will be receiving a significant decrease in her monthly income stream. It properly observed, “At that time, it appears [Mary Ann’s] income stream will be either comparable or less than that of [Jeffrey].”

¶14 The court also stated as to any claim of maintenance during the divorce action:

I would note [Mary Ann] has paid the monthly mortgage payments and some additional bills of [Jeffrey]. I find these payments made by [Mary Ann] during the divorce action to offset any maintenance claim by [Jeffrey] as he had the exclusive benefit of the residence during this action. Therefore, the claim of [Jeffrey] for maintenance during the period of the divorce is denied.

¶15 The circuit court properly evaluated the multiple factors within WIS. STAT. § 767.56, and gave a lengthy explanation supporting its decision to deny Jeffrey maintenance. Specifically, the court emphasized this was not a long-term marriage. It also considered the parties’ age and physical health. The court further noted it had just ordered an equalized property division. The court discussed the parties’ educational levels at the time of the marriage, and that neither party contributed to the other’s earning power. In discussing the feasibility of the party seeking maintenance to become self-supporting, the court stated that within thirty-six months: “With comparable income streams, both parties are in an equal position to remain self-supporting and enjoying a similar standard of living.”

¶16 The record indicates the circuit court examined the relevant facts, applied a proper standard of law, and reached a conclusion based upon a logical

rationale. The court's maintenance decision was an appropriate exercise of discretion.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

